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No. 94-1684

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

AGRICULTURAL LABOR RELATIONS BOARD, J. ANTONIO BARBOSA, INVONNE RAMOS RICHARDSON, and LINDA A. FRICK,

Petitioners,

V.

BUD ANTLE, INC. dba BUD OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits federal courts from enjoining state administrative proceedings which are adjudicatory or quasi-judicial in nature.

2) Whether the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), prohibits federal courts from deciding cases in which state proceedings are ongoing, implicate important state interests, and provide an adequate opportunity to raise federal questions.

3) Whether the preemption doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), applies when a state administrative agency having jurisdiction over labor relations involving "agricultural laborers" asserts jurisdiction over unfair labor practices involving employees "arguably" subject to the jurisdiction of the National Labor Relations Board.

4) Whether a private party may bring an action in federal court seeking injunctive relief against a state agency on the basis of preemption by the National Labor Relations Act.

RULE 29.1 STATEMENT

Respondent Bud Antle, Inc. dba Bud of California is a wholly owned subsidiary of Dole Fresh Vegetables, Inc., which is itself a wholly owned subsidiary of Dole Food Company, Inc.

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Respondent Bud Antle, Inc. dba Bud of California ("Respondent", "Bud" or "Company") hereby respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioners Agricultural Labor Relations Board, J. Antonio Barbosa, Ivonne Ramos Richardson, and Linda A. Frick, ("ALRB") seeking review of the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on January 17, 1995. The Ninth Circuit's opinion is reported as *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1994), and is reproduced in the Appendix ("A.") to Petitioners' Petition at pages 1 through 40.

RESPONSE TO STATEMENT OF THE CASE

It is possible to glean from the Petition's Statement of the Case that the underlying dispute between ALRB and the Company revolves around whether employees who work in the Company's vegetable cooling plants in California (the "Bargaining Unit") were "employees" within the meaning of Section 2(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 152(3), or "agricultural laborers" excluded from the coverage of the NLRA pursuant to the same statutory provision, in 1989. However, the Petition's Statement of the Case is deficient in at least three important respects. First, it fails to discuss the applicable standards used by the National Labor Relations Board ("NLRB") and approved by this Court for determining "agricultural laborer" status, and therefore the extent of the NLRB's exclusive jurisdiction over unfair labor practice charges, and how the preemption doctrine articulated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*") and its progeny impacts on state regulation of labor disputes which involve employees "arguably" within the NLRB's jurisdiction. Second, ALRB fails to acknowledge that the blame for the failure of Fresh Fruit & Vegetable Workers' Local 78-B

("Union") to timely file charges involving the Bargaining Unit with the NLRB lies with the Union itself. Finally, and most importantly, ALRB's Petition fails to mention that ALRB has continued to assert jurisdiction over unfair labor practice charges involving the Bargaining Unit despite repeatedly being advised by the NLRB, both explicitly and implicitly, that the employees in the Bargaining Unit are and were covered by the NLRA. It is these matters which were omitted from ALRB's Statement which compel denial of the Petition.

I. "Agricultural Laborer" Status Under The NLRA And *Garmon* Preemption.

The NLRA, 29 U.S.C. 141 *et seq.*, is a comprehensive federal statutory scheme regulating collective bargaining between employers and the labor organizations that represent their employees. However, the NLRA specifically excludes "agricultural laborers" from coverage: "[t]he term 'employee'... shall not include any individual employed as an agricultural laborer . . ." (29 U.S.C. 152(3)). Although the NLRA does not define the term "agricultural laborer", Congress has continuously included in the NLRB's annual appropriation act a proviso directing the NLRB to apply the definition of "agriculture" found in Section 3(f) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 203(f). *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 300 n.6 (1977).

Section 3(f) of the FLSA defines "agriculture" as "farming in all its branches . . . and any practices . . . performed by a farmer or on a farm . . . ". Under both this definition and the NLRA, employees working in "off the farm" facilities such as the vacuum cooling plants where the Bargaining Unit employees involved herein work are considered "agricultural laborers" only if they are employed by the "farmer" of substantially all the commodities

processed through the facilities. *Camsco Produce Co.*, 297 NLRB 905 (1990); *D'Arrigo Bros. Co. of California*, 171 NLRB 22 (1968). If the employer is not the "farmer" of the commodities, the employees are not "agricultural laborers" and the NLRB has exclusive jurisdiction over unfair labor practice charges involving the employees. *Employer Members of Grower-Shipper Vegetable Assn.*, 230 NLRB 1011, 1012-1013 (1977), *overruled on other grounds, Camsco Produce, supra.* And as most relevant here, the NLRB, the Department of Labor, and this Court all agree that an employer is not a "farmer" even if it harvests crops grown by its agent and in which it has an investment interest, or otherwise handles agricultural commodities which are grown by a partnership in which the employer is a partner. 29 C.F.R. 780.131-780.132; *Bayside Enterprises v. NLRB, supra*; *Waldo Rohnert Co. v. NLRB*, 322 F.2d 46 (9th Cir. 1963); *Employer Members, supra*; *Green Giant Co.*, 223 NLRB 377 (1976); *Norton & McElroy Produce, Inc.*, 133 NLRB 104 (1961).

The determination of whether the Company is the "farmer" of the commodities handled by the Bargaining Unit is therefore of critical importance in deciding whether ALRB usurped the statutory jurisdiction of the NLRB when it asserted jurisdiction over the merits of the Union's unfair labor practice charges. This is so because under *Garmon* and its progeny the NLRA preempts state regulation of conduct which is even "arguably" subject to the unfair labor practice jurisdiction of the NLRB. *See, i.e., Garmon*, 359 U.S. at 244-245; *Garner v. Teamsters, Chauffeurs and Helpers Local Union*, 346 U.S. 485 (1953); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957). As the Court stated in *Garmon*, "[w]hen an activity is arguably subject to 7 or 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted" (359 U.S. at 244-245).

Nor can a state tribunal assume jurisdiction over "arguable" unfair labor practices because the limitations period of the NLRA (29 U.S.C. 160(b)) has expired. If the controversy presented to the state tribunal could have been, but was not, presented to the NLRB, the "state's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the NLRB which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid" (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 197 (1978)).

Additionally, NLRA preemption must be respected even if the NLRB fails or refuses to decide whether the activity at issue is protected or prohibited or, as more relevant here, whether certain employees are covered by the NLRA or excluded as "agricultural laborers". As explained in *Garmon*:

> To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity . . . . [T]he Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss v. Utah Labor Relations Board*, 353 U.S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity

> does not give the States the power to act. *In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction.* The withdrawal of this narrow area from possible state activity follows from our decisions in *Weber* and *Guss*.
>
> In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of 7 or 8 of the Act, the State's jurisdiction is displaced.

Id., 359 U.S. at 245-246 (emphasis added).

"Arguable" preemption also applies to determinations involving "employee" status under Section 2(3) of the NLRA. For example, in *International Longshoremen's Asso. v. Davis*, 476 U.S. 380 (1986), the NLRA preemption issue turned on whether the respondent was an "employee" or a "supervisor" under the Act. "We should inquire, then, whether Davis was *arguably* an employee rather than a supervisor. If he was, the issue was to be initially decided by the NLRB, not the state courts." *Id.* at 394 (emphasis added). The Court then went on to reject the union's claim that Davis was not a supervisor merely because the NLRB had never determined that he was a supervisor. The Court held that under *Garmon*, "a court first must decide whether there is an arguable case for preemption; if there is, it must defer to the Board and only if the Board decides that the conduct is *not* protected or prohibited may the court entertain the litigation" (*id.* at 397) (emphasis added). *See also*

International Asso. of Bridge, Structural & Ornamental Iron Workers Union v. Perko, 373 U.S. 701, 705-706 (1963) (Court holds that since plaintiff was "arguably" an "employee" within the meaning of NLRA 2(3), his state court complaint was preempted by *Garmon*).

From the above, it is evident that if the Bargaining Unit is composed of employees "arguably" covered by the NLRA (that is to say, if the Company is "arguably" *not* a farmer), then ALRB's assertion of jurisdiction violated the preemption principles of *Garmon*. As succinctly stated by the Ninth Circuit: "Even if Bud's workers are only *arguably* not agricultural laborers, the company's conduct is at least arguably prohibited [by the NLRA] . . . . Thus, the question before us is whether Bud's workers are arguably 'employees' rather than 'agricultural laborers'." A. at 28 (emphasis original).

II. The Union Made A Conscious Decision To Avoid The NLRB.

ALRB's Petition maintains that the collective bargaining relationship between Bud and the Union would never have come about without the passage of the California Agricultural Labor Relations Act ("ALRA"), Cal. Labor Code 1140 *et seq.*, in 1975 and ALRB's 1976 certification of the Union as the representative of the Bargaining Unit. P. at 3-4, 20. However, the true facts are that Bud and the Union's collective bargaining relationship began in the early 1970s, *before* the ALRA was passed and the Union was issued a certification by ALRB (CR 11 (exh. 21 at 7)).[1] Moreover, in 1982, six years *after* the Union's ALRB certification but seven years *before* the Union filed its charges with ALRB, the Union admitted that the Bargaining Unit was covered by

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[1] "CR" refers to the number designated for the referenced document by the district court clerk's docket sheet.

the NLRA when the Union answered an unfair labor practice complaint issued against it by the NLRB. CR 48 (exh. 41-42).

ALRB's Statement of the Case does correctly state that the Union filed "backup charges" with the NLRB in September 1991, and that those charges were dismissed by the NLRB because they were untimely. P. at 5. ALRB then claims that the Court must grant certiorari in this case because to decide otherwise "will mean that the unfair labor practices will never be litigated in any forum" (*id.* at 10). However, ALRB's Petition fails to recite the facts which explain that the Union has only itself to blame for this state of affairs.

While it is true that Bud filed unfair labor practice charges against the Union with ALRB in September 1989, by December 1989 it realized that the Bargaining Unit was actually covered by the NLRB and so notified ALRB. Bud subsequently withdrew its own ALRB charges and in mid-January 1990 re-filed those charges with the NLRB. *The Union has admitted in the proceedings below that its receipt of those NLRB charges placed it on notice that Bud contended the NLRB, not ALRB, had jurisdiction over the Bargaining Unit.* CR 19 (exh. 36). Thus, the Union could have timely filed charges with the NLRB at that time alleging as unfair labor practices all the conduct placed at issue by the Union's ALRB charges. Instead, the Union waited more than 20 months to file its parallel charges with the NLRB, apparently because it believed ALRB would be a much friendlier audience for its charges than would the NLRB.[2]

Finally, the NLRB's general counsel has ruled that the delay relied on by ALRB in support of its Petition was

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[2] The Union was right. ALRB's bias against Bud is discussed below with respect to *Younger* abstention (*post* at 21-22).

caused by the Union, not Bud. In dismissing the Union's NLRB charges the NLRB's general counsel wrote:

> As for incidents which took place in 1989 and 1990, it could not be established that the Union's failure to file a charge within six months after those events took place was attributable to any conduct on the part of either the Employer or of this agency which would justify tolling the Section 10(b) period. Rather, the Employer filed charges against the Union and petitions concerning the unit employees in question with this agency in 1990, including the petition in Case No. 21-UC-350 where the Board asserted jurisdiction concerning these employees. Therefore, contrary to [the Union's] contention on appeal, the Union was in a position to file a timely charge concerning the events occurring outside the instant Section 10(b) period. [CR 11 (exh. 29)].

The facts set forth above must be kept in mind when the Court reads the "appeals to emotion" which are made in ALRB's Petition, and which most certainly will be made in the anticipated *amicus* brief of the Union.

III. The NLRB Repeatedly Told ALRB It Did Not Have Jurisdiction, But ALRB Would Not Listen.

Bud would not have been forced to resort to the federal courts, and this Petition would not now be here, if ALRB would have, just once, listened to the NLRB when deciding whether it could properly assert jurisdiction over the merits of the Union's charges. Apparently ALRB does not want this Court to hear the NLRB either, because the Petition does not mention much of what the NLRB said. Bud will now fill in the gaps.

In September 1990 Bud filed a unit clarification petition with the NLRB seeking a NLRB determination that the employees in the Bargaining Unit were "employees" within the meaning of Section 2(3) of the NLRA, and therefore covered by the federal act rather than the ALRA. While Bud's petition was pending before the NLRB, ALRB filed a request for an advisory opinion with the NLRB. ALRB's request contended that Bud's unit clarification petition was "mischievous" and frustrated collective bargaining, and asked that the NLRB permit ALRB to assert jurisdiction over the Union's charges. NLRB dismissed ALRB's request. Bud then filed a motion with ALRB asking ALRB to suspend its proceedings on the Union's charges until the NLRB determined in the unit clarification case whether the Bargaining Unit was covered by the NLRA. ***ALRB denied Bud's request to suspend the state proceedings.*** CR 11 (exh. 4, 16-19).

The NLRB unit clarification hearing began in February 1991 and concluded in March 1991. ALRB appeared as *amicus curiae* and urged the NLRB not to issue a decision which would preclude ALRB from asserting jurisdiction over the Union's charges. For its part, Bud introduced evidence establishing that Bud had never been the "farmer" of any of the commodities handled by the Bargaining Unit during the period from January 1988 to date. CR 11 (exh. 20; 5).

On May 1, 1991 the NLRB's regional director issued a unit clarification decision concerning the Bargaining Unit. As relevant here, the unit clarification decision held that Bud was *not* the "farmer" of the commodities handled by the Bargaining Unit during the period of time covered by the Union's charges, and that the Bargaining Unit employees are therefore "employees" covered by the NLRA.

> Thus, in the present scenario, I conclude that the Employer-Petitioner is not a "farmer" by virtue of the fact that it germinates seeds, transplants crops, or harvests crops. The record is clear that the actual cultivation of the crops is performed by the growers, and that the growers retain the risk and the responsibility for the crops until they are harvested. Accordingly, *since the Employer-Petitioner is not a "farmer," the contractual Bargaining Unit employees are not agricultural employees.* [CR 11 (exh. 21 at 18) (emphasis added)].

But despite the fact that the record established that Bud had operated identically with respect to "non-farmer" and Bargaining Unit "employee" status since at least January 1988, the decision limited its specific clarification to the period of time during which the unit clarification hearing took place (February and March 1991) and thereafter. The NLRB's regional director reasoned that since the status of the Bargaining Unit prior to the time of the NLRB hearing was then before ALRB by virtue of the Union's ALRB charges, it would not be appropriate to address whether ALRB had jurisdiction to continue prosecution of those charges:

> [A] hearing before the ALRB was commenced on April 16, 1991, in which the Employer-Petitioner contends that it is not under the ALRB's jurisdiction. The effect of the clarification herein on the proceedings before the ALRB should be determined in that proceeding by the ALRB and the reviewing courts. *Thus, the question as to whether the ALRB has jurisdiction to continue prosecution of those charges currently before it is not*

appropriately addressed herein. [A. at 9-10 (emphasis added)].[3]

Immediately upon receiving the unit clarification decision Bud requested that ALRB dismiss the Union's unfair labor practice charges because the NLRB's decision clearly established that the Bargaining Unit was covered by the NLRA at all relevant times. ***ALRB denied Bud's request.*** CR 11 (exh. 6). Bud then asked ALRB to bifurcate its proceedings so that the jurisdictional issue would be decided before the parties were required to litigate the merits of the Union's charges. ALRB's administrative law judge denied the request, and Bud filed an application for a temporary restraining order with the U.S. District Court for the Southern District of California to enjoin ALRB from proceeding on the Union's charges pending the termination of all proceedings before the NLRB relating to the unit clarification petition.[4] Upon being notified of the application, ALRB ordered that the state hearing be bifurcated. As a result, the action then pending before the district court was dismissed by stipulation. CR 11 (exh. 6, 31-34).

Meanwhile, Bud filed a separate unit clarification petition with the NLRB requesting that the NLRB clarify the Section 2(3) "employee" status of its harvest and harvest support employees represented by Teamsters Local 890. The entire record created before the ***ALRB*** relevant to Bud's "farmer" status was admitted into evidence for consideration by the NLRB. The NLRB *again* found that Bud was not the

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[3] The last sentence of the regional director's footnote does not appear anywhere in the Petition, but was an important factor in the Ninth Circuit's rejection of ALRB's argument that it was not preempted from asserting jurisdiction over the Bargaining Unit (A. at 34-40).

[4] Those proceedings terminated in August 1991 when the NLRB denied all requests for review of the regional director's decision.

"farmer" of any of the commodities handled by the Bargaining Unit, and concluded that all Bud harvesting employees other than those actually engaged in removing the growing crops from their attachment to the soil are "employees" covered by the NLRA, not "agricultural laborers". CR 11 (exh. 23).

As referenced above, the Union also filed an unfair labor practice charge with the NLRB in September 1991 which paralleled its ALRB charges. The NLRB dismissed the Union's charge because it was untimely -- not because the NLRB lacked subject matter jurisdiction.

On September 16, 1992 ALRB issued an "Interlocutory Decision On Jurisdiction", reported at 18 ALRB No. 6, affirming its administrative law judge's December 1991 decision asserting jurisdiction over the Bargaining Unit and the merits of the Union's unfair labor practice charges. ALRB's decision *rejects* the NLRB's finding that Bud was not the "farmer" of the commodities handled by the Bargaining Unit. It also *rejects* the proposition that ALRB is required to follow decisions of the NLRB in deciding issues relating to "agricultural laborer" status. Applying a legal analysis which ALRB *admitted* the NLRB had *never* used in deciding issues of "agricultural laborer" status, ALRB held that Bud is a "farmer" and that ALRB "has jurisdiction over all aspects, both substantive and remedial, of the unfair labor practices alleged in [the Union's ALRB charges]". ALRB also determined that the NLRB's dismissal of the Union's NLRB charges filed in September 1991 was not "equivalent to a ruling on jurisdiction", and therefore was not relevant in deciding the preemption issue raised by Bud. ALRB's decision *did not even reference* the NLRB's unit clarification decision involving Bud's harvest employees, even though ALRB was aware that the NLRB's finding therein that Bud was not a "farmer" *was based on the identical record as that before ALRB when it reached the*

opposite conclusion. CR 11 (exh. 9 at 60-87; exh. 10 at 11 (n.8), 16, 18, 24-26).

Bud immediately filed a petition for writ of review of ALRB's decision with the California court of appeal. However, because ALRB called its decision "interlocutory", ALRB prevented Bud from obtaining state court review. A. at 11. It was at this point that Bud was forced to resort to the federal courts, and filed its complaint seeking declaratory and injunctive relief based on NLRA preemption, as well as damages pursuant to 42 U.S.C. section 1983.

Teamsters Local 890 subsequently requested that the NLRB reconsider its finding that Bud was not a "farmer", made in the unit clarification proceeding involving Bud's harvest employees, in light of ALRB's decision finding that Bud is a "farmer". The NLRB took the opportunity provided by the Teamsters' request to articulate, in a formal decision, the NLRB's concern over the conflict between ALRB's decision and the NLRB's consistent findings that Bud is not a "farmer", noting that "[s]uch a Federal-state jurisdictional conflict raises concerns which go beyond the immediate interests of the parties and should not go unaddressed." *Bud of California*, 311 NLRB 1352 (1993). The NLRB's decision specifically criticized the analysis employed by ALRB in asserting jurisdiction over the Bargaining Unit, finding that ALRB's "farmer" analysis was inconsistent with well established NLRB precedent and this Court's decision in *Bayside*. *Id.* at 1353. Accordingly, the NLRB denied the Teamsters' request on the merits (*id.*).

Upon notification of the NLRB's *Bud of California* decision, Bud filed a motion with ALRB asking it to reconsider its decision asserting jurisdiction over the Bargaining Unit in light of the NLRB's pointed criticism of ALRB's "farmer" finding. ALRB responded by declaring

that "the decision of the NLRB now proffered by Bud is neither relevant to nor in conflict with 18 ALRB No. 6".

Thus, by its decision in the unit clarification case involving the Bargaining Unit, its decision clarifying that the bulk of Bud's harvesting employees are covered by the NLRA, and again in its *Bud of California* decision, the NLRB made clear to ALRB that Bud is not a "farmer" and that ALRB therefore has no jurisdiction over unfair labor practice charges involving the Bargaining Unit. The NLRB sent this same message to ALRB, albeit implicitly, when it dismissed the Union's NLRB charge for reasons other than lack of NLRA jurisdiction. A. at 38. Based on these NLRB pronouncements, Bud repeatedly requested ALRB to discontinue its proceedings. ALRB adamantly refused to do so, again and again finding that it was free to ignore the NLRB's rulings. Thus, Bud had no choice but to seek relief from the federal courts. That is why the court below enjoined ALRB's proceedings. That is also why this Court should deny ALRB's Petition.

REASONS TO DENY THE WRIT

The Ninth Circuit's conclusion that the Anti-Injunction Act, 28 U.S.C. 2283, does not apply to state administrative proceedings is consistent with the unambiguous language of that statute and the decisions of the federal courts. The Anti-Injunction Act issue is also of marginal significance given the abstention doctrine set out in *Younger v. Harris,* 401 U.S. 37 (1971) (*"Younger"*) and its progeny. There is no dispute between ALRB and the Ninth Circuit over the test to be used in applying *Younger* abstention, ALRB simply contends that the test was misapplied in this specific case. Moreover, the Ninth Circuit's finding that *Younger* abstention did not operate in this case is consistent with the decisions of this

Court and the policies underlying that doctrine. ALRB's contention that *Garmon* preemption should not apply to its actions because of its role in regulating labor relations involving agricultural laborers was not raised below, and is directly contrary to *Garmon* and the need for federal preemption of state conduct seeking to regulate labor relations of employers engaged in interstate commerce. Finally, the Ninth Circuit's conclusion that a private party may bring an action in federal court based on NLRA preemption simply follows this Court's cases finding that such actions are appropriate. In sum, the only thing remarkable about this case is ALRB's unbending resolve to require Bud to answer for alleged unfair labor practices over which ALRB clearly is without subject matter jurisdiction. ALRB's Petition should be denied in its entirety.

I. The Anti-Injunction Act Means What It Says.

ALRB's Petition contends that this Court should review the Ninth Circuit's finding that the Anti-Injunction Act ("AIA"), 28 U.S.C 2283, applies only to state courts and does not bar injunctive relief directed at state administrative proceedings. However, neither the language of the statute itself nor the case law developed thereunder support ALRB's contention. Moreover, the issue raised by ALRB is of marginal importance to the proper functioning of the federal courts.

The AIA provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The language of the statute could not be clearer -- it only prohibits injunctions directed to proceedings in a state *"court"*. Pertinent case law confirms that the statute has no applicability whatsoever to *administrative* proceedings. *Mississippi Railroad Commission v. Illinois Central Railroad Company*, 203 U.S. 335, 341 (1906) (AIA's predecessor statute does not apply to injunctions directed to an administrative agency, even if the agency's proceedings may result in state court proceedings); *Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820, 824 (7th Cir. 1990) (the AIA is inapplicable where the requested injunction would not interfere with state *court* proceedings); *Engleman v. Cahn*, 425 F.2d 954, 958 (2d Cir. 1969), *cert. denied*, 397 U.S. 1009 (1979) ("the anti-injunction statute, 28 U.S.C. 2283, is inapplicable since it relates only to *pending* state *court* proceedings") (emphasis original); *Matson Navigation v. Hawaii Pub. Util. Comm'n*, 742 F. Supp. 1468, 1478 (D. Hawaii 1990) (*Younger* applies to administrative proceedings which are judicial in nature but AIA does not).

ALRB seeks to avoid the statutory language and cases cited above by arguing that the Court's "suggestion" in *Gibson v. Berryhill*, 411 U.S. 564 (1973), that the AIA "may" apply to administrative agencies as well as courts should now be confirmed as the law. P. at 8. However, ALRB's reliance on *Gibson* is misplaced. The Court in *Gibson* merely stated, in a footnote, that it was not required to decide in that case whether the AIA applies to proceedings before a state administrative body (*Gibson* at 573 n.12). The Court most certainly did not "suggest" the AIA *would* apply. Neither the Court's footnote in *Gibson* nor the fact that a number of federal courts have not been required to squarely address the issue raised by ALRB provide sufficient grounds to grant ALRB's Petition on this issue.

Additionally, even accepting as true ALRB's assertion that "[t]he instant case is the first since *Gibson* in which

precisely the situation referred to in the *Gibson* footnote is presented" (P. at 10), the statement actually mitigates *against* ALRB's Petition. If this issue only arises once every 20 years, it is hardly one of significance worthy of this Court's attention. Moreover, and as noted in the Ninth Circuit's opinion below, a literal interpretation of the AIA does not leave the federal courts free to unduly interfere with legitimate state administrative proceedings which are judicial in character given this Court's *Younger* abstention doctrine. A. at 23. Finally, even if the AIA did apply, injunctive relief is still appropriate here under the "effectuation of judgment" exception to the AIA, as the court below properly granted Bud's motion for summary judgment based on NLRA preemption.

In sum, all federal courts which have addressed the scope of the AIA have held that it applies only to state *court* proceedings. The cases are consistent with the unambiguous language of the statute. That the AIA issue raised by ALRB has been dormant for over two decades illustrates that it is of marginal significance to the proper functioning of the federal courts. Review of this issue is unwarranted.

II. The Ninth Circuit Properly Applied The Law In Concluding That *Younger* Abstention Did Not Preclude The Exercise Of Federal Jurisdiction.

ALRB's Petition does not suggest that the Ninth Circuit's opinion in this case applied the incorrect legal standard in dismissing ALRB's argument that the federal court should have refused to exercise its jurisdiction on the basis of *Younger* abstention. In fact, the Ninth Circuit and ALRB agree that abstention on the basis of *Younger* is appropriate where (1) there are ongoing state proceedings; (2) the proceedings implicate important state interests; and (3) the proceedings provide an adequate opportunity to raise federal questions (A. at 24-25; P. at i, 11). ALRB simply disagrees

with the Ninth Circuit's application of *Younger* to the specific facts presented in this particular case (P. at 12-13). A litigant's disagreement with the manner in which a court of appeal has applied settled law to a particular fact situation involving only that party, where reoccurrence is highly unlikely, does not warrant review by this Court. ALRB's Petition should be summarily denied for this reason alone.

Moreover, it is clear that the Ninth Circuit below properly applied *Younger*. In *New Orleans Public Services, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"), the Court noted[5] that a facially conclusive claim of federal preemption may render *Younger* abstention inappropriate (*id.* at 367). The Ninth Circuit found below that no factual inquiry was necessary to decide the NLRA preemption issue presented here (A. at 26 n. 16). ALRB's Petition does not challenge this finding. In fact, ALRB's Petition implicitly concedes the presence of a facially conclusive claim of NLRA preemption (P. at 11-12). Nonetheless, ALRB contends that the Court's pre-*NOPSI* decisions in *Younger* and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), should be extended so that abstention operates even in the face of a facially conclusive claim of federal preemption unless "the very integrity of the state proceedings [is] called into question" (P. at 16).

ALRB's argument goes much further than this Court ever has. Moreover, ALRB's argument if accepted would allow the principle of comity to permit a state agency to interfere indefinitely with a labor dispute which Congress and *Garmon* clearly commit to the exclusive jurisdiction of the

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[5] *NOPSI* held that *Younger* abstention did not apply because the proceeding involved was legislative rather than judicial (491 U.S. at 371). Accordingly, *NOPSI's* discussion of the "legitimate state interests" component of *Younger* abstention was unnecessary to the decision.

NLRB. Additionally, Bud's complaint and the conduct of ALRB which required that Bud pursue that complaint does in fact call into question the integrity of ALRB's proceedings.

ALRB does not explain why the Court found it necessary in *NOPSI* to spell out the reasons a facially conclusive preemption claim was *not* present in that case (*NOPSI*, 491 U.S. at 367) if the existence of such a claim was not relevant to *Younger* abstention anyway. And unlike the situation in *NOPSI* (*see id.*), ALRB here *is* clearly interfering with Bud's rights under the NLRA and *is* violating the preemptive effect of the NLRA. ALRB also *has* questioned the "validity" of the NLRB's unit clarification decision and the "prudence" of its jurisprudence analyzing "agricultural laborer" issues (*id.*). In fact, ALRB acknowledges that its assertion of jurisdiction over the Bargaining Unit is contrary to both. A. at 31-33. Moreover, ALRB has consistently criticized and disregarded every action by the NLRB establishing that ALRB is preempted by the NLRA from asserting jurisdiction over the Bargaining Unit. Thus, ALRB's assertion of jurisdiction over the merits of the Union's unfair labor practice charges is "directly . . . foreclosed by the federal statute . . . and the case law applying it" (491 U.S. at 367). ALRB's conduct is therefore "flagrantly unlawful" for purposes of *Younger* abstention analysis. *Id.* The Ninth Circuit correctly applied *NOPSI* in determining that *Younger* abstention was inapplicable in the particular facts of this case.

The fact that Bud's claim of NLRA preemption is facially conclusive also answers ALRB's contention that the State of California's interest in regulating collective bargaining involving "agricultural laborers" mandates *Younger* abstention. As the Ninth Circuit noted below, "even if there is a strong state interest in regulating agricultural labor relations in general, that interest is hardly so strong as to require us to conclude that it extends to the

farthest conceivable limits -- to off-the-farm work performed by non-farmers. To the contrary, in such cases, the strong policies of federal preemption are dominant." A. 34 n.20. Simply put, California's interest in regulating labor relations involving *field workers* is in no way impacted by the injunction issued in this case. ALRB has asserted jurisdiction over unfair labor practices involving employees who work in a processing plant and whom the NLRB has repeatedly held are covered by the NLRA. Thus, ALRB is acting despite a total lack of subject matter jurisdiction. ALRB's conduct serves *no* legitimate state interest.[6]

To accept ALRB's argument would allow a state labor board to assert jurisdiction over unfair labor practice claims involving employees whom the NLRB has concluded are *not* "agricultural laborers", and therefore are completely outside of the state agency's subject matter jurisdiction, because labor relations involving employees who *are* agricultural laborers is a "legitimate state interest". This Court has never extended *Younger* to such a degree. Research fails to disclose any cases where this Court, or any other federal court, abstained on the basis of *Younger* even though the state court/agency was acting in the clear absence of jurisdiction over the subject matter of the state proceeding.[7]

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[6] ALRB's contention that in this case it simply "misinterpreted" the "murky and uncertain parameters of 'agriculture'" (P. at 17) is belied by ALRB's deliberate rejection of the NLRB's decisions involving Bud.

[7] In *Younger*, there was no question that the Superior Courts of California had jurisdiction over any criminal conduct which was alleged to have occurred within that state's borders, and therefore had subject matter jurisdiction over the prosecution of Harris. Similarly, in *Huffman* there was no question raised with respect to the Ohio Court of Common Pleas' subject matter jurisdiction over a civil nuisance action. In *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), there was no question that the Ohio Civil Rights Commission had

(continued...)

And in this case ALRB *is* acting totally without subject matter jurisdiction because its proceedings are, without question, preempted by the NLRA. ALRB is adjudicating unfair labor practice charges involving "employees" subject to the exclusive unfair labor practice jurisdiction of the NLRB.

To extend the *Younger* doctrine to this case would make a mockery of comity and the basic principle that "abstention from the exercise of federal jurisdiction is the exception, not the rule" (*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976); *NOPSI*, 491 U.S. at 359. Indeed, it is disingenuous for ALRB to argue that the court below did not extend sufficient comity to ALRB when ALRB has spent the past four years thumbing its nose at the NLRB and this Court's *Garmon* jurisprudence. *Younger* abstention simply cannot operate where a federal plaintiff has presented a facially conclusive claim of NLRA preemption.

Moreover, even if ALRB was correct in the assertion that *Younger* abstention applies even in the face of a facially conclusive claim of federal preemption, *Younger* still should not be applied here because ALRB's proceedings are being conducted in bad faith. As noted, ALRB has continued to assert jurisdiction despite the undeniable existence of NLRA preemption. ALRB has admittedly disregarded NLRA precedent, the NLRB's unit clarification decision finding the Bargaining Unit is covered by the NLRA, the NLRB's many decisions finding Bud is not a "farmer", and the NLRB's *Bud of California* decision specifically criticizing the analysis

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(...continued)
jurisdiction over allegations of sexual discrimination against citizens of that state, and therefore had subject matter jurisdiction over the complaint filed against Dayton. In *NOPSI* the City Council of New Orleans had jurisdiction over intrastate utility rates, the subject matter of the proceeding involved therein.

used by ALRB in asserting jurisdiction over the Bargaining Unit, in its zeal to require Bud to answer to ALRB for its collective bargaining conduct. Given the existence of clear NLRA preemption, ALRB's purpose in pursuing these charges appears calculated to harass Bud because Bud has attempted to exercise its rights under the NLRA, not to make valid unfair labor practice findings.[8] ALRB is not conducting its proceedings "with any expectation of securing valid convictions, but rather [as] part of a plan . . . to harass" (*Younger*, 401 U.S. at 48) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965)). Thus, *Younger* abstention does not operate here even under the limited exceptions to that doctrine recognized by ALRB (P. at 16-17).[9]

Finally, ALRB's contention that *Younger* abstention should apply because the NLRB believes that this matter should proceed through the state courts (P. at 17-19) mischaracterizes the NLRB's position. ALRB's argument that the footnote of the unit clarification decision quoted above (*see ante* at 10-11) favors abstention was considered and rejected by the Ninth Circuit. A. at 34-37. As noted by the court, the regional director's footnote "merely stated that the issue of ALRB jurisdiction as of 1989 was not properly before her: 'the question as to whether ALRB has jurisdiction

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[8] The Section 1983 claims of Bud's complaint allege ALRB has asserted jurisdiction because Bud exercised its rights under the NLRA to engage in hard bargaining with the Union, to implement terms and conditions of employment at impasse, to lock out the Bargaining Unit pending the Union's acceptance of Bud's collective bargaining proposals, and because Bud has denied that the Bargaining Unit is subject to ALRB's jurisdiction.

[9] The court below did not pass on this issue because of its finding that Bud's NLRA preemption claim was facially conclusive.

to continue prosecution of those charges currently before it is not appropriately addressed herein'" (*id.* at 37).[10]

The NLRB's amicus brief filed with the Court of Appeal did suggest that *Younger* abstention was proper here. However, that contention was based on the NLRB's belief that because a "factual inquiry" is generally necessary to determine "agricultural laborer" status, this case did not present a facially conclusive claim of NLRA preemption. A. at 26 n.16. The erroneous assumption on which the NLRB's position was based[11] was also answered by the Ninth Circuit's opinion:

> [T]he preemption issue in this case requires *no* further factual inquiry. The NLRB's decisions in cases involving the same company, issue, and unit make it clear by themselves that the ALRB's jurisdiction over the Bargaining Unit is preempted.

Id. (emphasis original).

In sum, because NLRA preemption of ALRB's assertion of jurisdiction over unfair labor practice charges involving the Bargaining Unit is facially conclusive, the court below properly found that, in the specific facts of this case, *Younger* abstention is not appropriate. This must be so, because surely *Younger* abstention cannot be read so broadly as to require Bud to endure more years of litigation before a state agency which is acting in the complete absence of subject matter jurisdiction and which has so flagrantly

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[10] As noted above, the sentence from the regional director's decision quoted by the court's opinion is omitted from ALRB's various versions of the "pertinent parts" of that footnote (*see* P. at 5, 18).

[11] NLRB's amicus brief candidly admitted that NLRB has no expertise on *Younger* abstention.

violated the preemptive effect of the NLRA before Bud may ask a federal court to resolve issues of federal law, and then only by discretionary review in this Court. Such a result is not comity – it is abdication. Given the egregious and blatant nature of ALRB's conduct, the court below properly refused to abstain from asserting its jurisdiction. The egregious and blatant nature of ALRB's disregard for NLRB preemption also makes this case one in which the *Younger* abstention issue turns on the peculiar facts of the case. Thus, review by this Court is not warranted.

III. ALRB's Argument That *Garmon* Preemption Should Not Apply Is Contrary To Thirty Five Years Of NLRA Preemption Jurisprudence.

ALRB's Petition asks whether *Garmon* should apply where the parties to the state proceeding can "reasonably be said to be . . . outside the jurisdiction of the National Labor Relations Act" (P. at i). However, the question posed by ALRB cannot be raised in the context of this case. The NLRB's decisions consistently holding that Bud is *not* a "farmer" and that the Bargaining Unit *is* covered by the NLRA make the contention that the Bargaining Unit is not covered by the Act untenable. It cannot "reasonably be said" the Bargaining Unit is outside of NLRA jurisdiction.

Correctly stated, the issue is whether *Garmon* applies when a state administrative agency having jurisdiction over labor relations involving "agricultural laborers" asserts jurisdiction over unfair labor practices involving employees "arguably" subject to the jurisdiction of the NLRB (*ante* at i). *Garmon* does.

Moreover, ALRB never contended before either the district court or the Ninth Circuit that *Garmon* did not apply to its actions in this case. Instead, it "argue[d] only that the NLRB somehow vested the state board with jurisdiction to

resolve the unfair labor practice charges that form the basis of this case" by virtue of the footnote in the NLRB's unit clarification decision discussed above. A. at 33-34. Since the *Garmon* issue now raised by ALRB's Petition was not passed on by the courts below, it cannot be urged before this Court. *See, i.e., City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 (n.5) (1989).

On the merits, the essence of ALRB's argument is that *Garmon* preemption should not apply because the states have power to police "agricultural labor relations" and the determination of what constitutes "agriculture" under the FLSA is "problematic". P. at 20-26. ALRB's argument must be rejected for a number of reasons, all of which provide an independent reason for denying ALRB's Petition.

First, ALRB's argument confuses the concept of "agricultural employer" and "agricultural laborer." That the NLRA governs labor relations in the "agricultural sector" of the economy cannot be denied. As this Court wrote in *Bayside*, "An employer's business may include both agricultural and nonagricultural activities. Thus, even though most of the operations on a sugar plantation are agricultural, persons employed in the plantation's sugar-processing plant are not 'agricultural employees.'" *Bayside Enterprises, supra*, 429 U.S. at 301. In fact, the NLRB has repeatedly asserted jurisdiction over Bud as "an employer engaged in commerce within the meaning of the Act" (CR 11 (exh. 21 at 1)).

Contrary to ALRB's assertion, Congress did not "choose to exclude agriculture from the NLRA" (A. at 24). Congress chose only to exclude "agricultural laborers", as defined by the NLRB in its decisions interpreting the "agricultural laborer" exemption under Section 2(3) of the NLRA, from the coverage of the federal act. And since the NLRB has unquestionable jurisdiction over unfair labor practices involving the Bargaining Unit despite their handling of

agricultural commodities, there is sharp conflict between the NLRA and ALRB's assertion of jurisdiction. Indeed, this conflict caused the NLRB to issue its *Bud of California* decision discussed above.

ALRB's contention that its function as a state labor board having jurisdiction over "agricultural laborers" allows it to reject the NLRB's standards for determining "farmer" and "agricultural laborer" status in deciding jurisdictional issues (P. at 23-24) is the very same argument rejected by this Court in both *Garner* and *Guss*. In both cases, state labor relations boards sought to regulate conduct which violated the NLRA. Finding that the NLRB must be entrusted with primary responsibility for the interpretation and application of the NLRA, and "to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies" (*Garner, supra*, 346 U.S. at 490), this Court held in both *Garner* and *Guss* that the states were without jurisdiction to act.

If *Guss* and *Garner* do not make clear that ALRB's contention is without merit, *Garmon* and *ILA v. Davis* do. Both cases hold that "close calls" regarding "agricultural laborer" status must be made by the NLRB. As succinctly stated by the Ninth Circuit in rejecting ALRB's attempt to avoid the applicability of this Court's decision in *Bayside*,[12]

> We reject the ALRB's distinction. The ALJ's analysis is completely inconsistent with *Garmon*. *Garmon* preempts state jurisdiction over activity that is *arguably* protected or prohibited by the NLRA precisely in order to allow the *NLRB* to make the determination in the first instance and to ensure that "the danger of state interference with

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[12] ALRB makes this same argument in its Petition. P. at 23-24 n.14.

> national policy is to be averted." *Garmon*, 359 U.S. at 245. As the *Garmon* Court explained, "It is essential that these determinations be left in the first instance to the National Labor Relations Board. . . .

A. at 33 (emphasis original).

ALRB's contention that "[t]he applicability of the *Garmon* preemption doctrine to a situation where there is a comprehensive state regulatory scheme such as the ALRA has not been previously addressed by this Court" (P. at 26) is false. *Guss, Garner, Garmon, Davis,* and *Perko* all make clear that determinations of "agricultural laborer" status must be entrusted to the NLRB; that the NLRB's standards must be applied by other tribunals when determining whether the employees and conduct at issue are arguably covered by the NLRA; and that those tribunals are without jurisdiction when arguable preemption is shown.

In sum, ALRB's argument that labor relations in the agricultural sector are of "peripheral interest" to the NLRA and involve "interests so deeply rooted in local feeling" that *Garmon* does not apply has force only with respect to labor relations involving "agricultural laborers". Indeed, ALRB itself repeatedly references California's concern over labor strife *in the fields* of California (P. at 22, 24). However, the Bargaining Unit employees are *not* field workers. They work in off-the-farm processing facilities. They are *not* employed by a farmer. They are employed by "the largest volume producer of fresh vegetables in the United States" (P. at 4). *Garmon* preemption applies.

IV. That A Party May Seek Declaratory And Injunctive Relief On The Basis Of NLRA Preemption Is Well Settled.

ALRB's Petition urges that the Court grant certiorari in order to consider whether the NLRA confers a "private right of action" based on *Garmon* preemption. P. at i, 26-28. However, the real issue is whether a private party may seek declaratory and injunctive relief in the federal courts based on NLRA preemption. *Ante* at i. This question has already been answered in the affirmative by both this Court and all other federal courts which have considered the issue. Private litigants can and have routinely petitioned for relief from state actions which violate the preemptive scope of the NLRA.

In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), this Court acknowledged the general rule that a litigant who seeks declaratory and injunctive relief from state regulation on the basis of preemption by a federal statute has presented a federal question over which the federal courts have jurisdiction pursuant to 28 U.S.C. 1331 (*id.* at 96 n.14). In *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), this Court specifically permitted a private party to proceed with a federal court action seeking declaratory and injunctive relief against the municipality-defendant on the basis of NLRA preemption (*id.* at 611, 620). *See also Golden State Transit v. City of Los Angeles*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting) (a plaintiff may vindicate NLRA preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under such federal jurisdictional statutes as 28 U.S.C. 1331 and 28 U.S.C. 2201-2202).

Conclusive is this Court's decision in *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986). In *Gould*, the district

court expressly held that the company's complaint alleging that a Wisconsin debarment scheme was preempted by the NLRA under *Garmon* stated "a valid cause of action over which this court may exercise jurisdiction" (576 F. Supp. 1290, 1293 (W.D. Wis. 1983)). This Court upheld the district court's finding of preemption without even suggesting the private party litigant therein lacked standing. Similarly, in *Building & Construction Trades Council v. Associated Builders and Contractors*, ___ U.S. ___, 113 S. Ct. 1190 (1993), the Court was untroubled by the court of appeal's finding that the private party plaintiff therein had stated a valid federal claim for declaratory and injunctive relief on the basis of NLRA preemption, although it did reject the plaintiff's claim on the merits. The federal courts of appeal have also routinely entertained the merits of NLRA preemption claims brought by private party litigants. *Babler Bros., Inc. v. Roberts*, 995 F.2d 911, 914-16 (9th Cir. 1993); *Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719, 724-25 (9th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990); *Southwestern Bell Tel. Co. v. Arkansas Public Serv. Comm'n*, 824 F.2d 672, 674 (8th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988); *Christ the King Regional High School v. Culvert*, 815 F.2d 219 (2d Cir. 1987), *cert. denied*, 484 U.S. 830 (1987).

ALRB's argument that to allow private party litigants to challenge state regulation on the basis of *Garmon* preemption will do violence to a uniform scheme of labor relations (A. at 27, 28) is wholly without merit. Not only is ALRB's position contrary to the cases cited above, it is also contrary to the view of the NLRB as expressed in its amicus brief filed with the Ninth Circuit. By its brief, NLRB noted that allowing a private party to bring an action in federal court asserting that state proceedings are preempted by the NLRA serves the goal of uniform application of labor laws. A. at

20. Here again is another example of ALRB ignoring the NLRB when ALRB disagrees.

Finally, ALRB's reliance on *Cort v. Ash*, 422 U.S. 66 (1975), is misplaced. *Cort* articulates the test for determining whether a federal statute creates a private right of action *for damages*. *Cort* has nothing to do with an action for declaratory and injunctive relief based on preemption by federal law, the situation involved in this case. Moreover, even if *Cort* were applicable, *Cort supports* the viability of a complaint based on NLRA preemption. A. at 20 n. 13. The Court need not expend its resources reviewing the Ninth Circuit's unremarkable conclusion that Bud was entitled to assert a claim for declaratory and injunctive relief based on NLRA preemption.

CONCLUSION

For the foregoing reasons, ALRB's Petition should be denied.

Respectfully submitted,

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